In the Supreme Court of the United States

OCTOBER TERM, 1967

CHARLES C. GREEN, ET AL., PETITIONERS

v.

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BRENDA K. MONROE, ET AL., PETITIONERS

v.

BOARD OF COMMISSIONERS OF THE CITY OF JACKSON, TENNESSEE, ET AL.

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v.

THE BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH, SIXTH AND EIGHTH CIRCUITS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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The central issue in these cases is the character and extent of the State's constitutional obligation in desegregating its public school system pursuant to

the mandate of *Brown* v. *Board of Education*, 347 U.S. 483, 349 U.S. 294. Although it is only one aspect of the problem, we focus on the pupil assignment policies of the three school districts involved because that is the most obvious defect of the plans in suit. Faculty desegregation and other measures designed to erase the labels "white" and "Negro" from the schools of the system are, of course, essential, as the courts below recognized. But effective desegregation is not accomplished so long as there remain all-Negro schools, attended by an overwhelming majority of the Negro children. It is that result in these cases, avoidable by employing a differing assignment technique, which invokes our concern.

In effect, each of the systems uses the so-called "freedom-of-choice" plan, under which each student is free to assign himself to any school in the district.[1] In each instance, a strict geographic assignment policy without the right of free transfer would desegregate the schools. In fact, more than 80% of the Negro children attend all-Negro schools, and this is attributable to a plan which permits the white students to assign themselves elsewhere. Nor are these isolated cases. "Freedom-of-choice" plans are much in vogue today, and the consequences are often the same. See

[1] In New Kent, Virginia (No. 695), every student entering the first and eighth grades is required to choose a school; thereafter, he is re-assigned to the same school unless he affirmatively elects a different school. In Jackson, Tennessee (No. 740), initial assignments are made by geographic zones, but every student is free to transfer to any other school. In Gould, Arkansas (No. 805), every student is apparently required to choose his school each year.

U.S. Commission on Civil Rights, *Southern School Desegregation 1966–1967* (1967), pp. 3, 8–9, 45–46, 94–95. The question is whether this technique is constitutionally permissible when it has the effect of substantially minimizing desegregation. The courts below answered in the affirmative, reasoning that it was enough if the school authorities removed all legal barriers to desegregation, leaving it to the students themselves to mix or not, as they chose.

In our view, so-called "freedom of choice" plans satisfy the State's obligation only if they are part of a comprehensive program which actually achieves desegregation. We do not contend that "freedom-of-choice" is *per se* invalid as an assignment technique or that its presence automatically condemns the desegregation plan of which it is a part. If substantial progress in eliminating all-Negro schools is shown, the Constitution does not forbid freedom of choice as an element in the plan. But when the results are like those reflected by these records, two objections must be interposed: *First,* against a background of prior State-compelled educational segregation, a freedom-of-choice plan that does not operate to eliminate all-Negro schools is an inadequate remedy to disestablish the dual school system; *secondly,* if the effect is to retard or defeat the desegregation that a geographic assignment policy would produce, allowing the students to make their own assignments impermissably abdicates the State's responsibility while effectively authorizing and facilitating public school segregation at the instance of the white students, with official sanction.

I

At the outset, we consider the plans in suit in their factual context. So judged, they are plainly inadequate as remedial devices responsive to the evils created by the previous *de jure* segregation in the three school districts. The persistence of all-Negro schools in all three systems is eloquent testimony to the fact that mere abandonment of compulsory student assignments based on race is insufficient to eliminate the continuing momentum of the past dual system. And it is apparent that the approach represented by the "freedom-of-choice" and "free transfer" provisions of the approved desegregation plans is essentially one of "laissez faire," and will not substantially improve the *status quo*.

Against the background of educational segregation long maintained by law, the duty of school authorities is to accomplish "the conversion of a de jure segregated dual system to a unitary, nonracial (nondiscriminatory) system—lock, stock, and barrel: students, faculty, staff, facilities, programs, and activities." *United States* v. *Jefferson County Board of Education,* 372 F. 836, 846, n. 5 (C.A. 5), affirmed on rehearing *en banc,* 380 F. 2d 385, certiorari denied, 389 U.S. 840. And see *Bradley* v. *School Board,* 382 U.S. 103; *Rogers* v. *Paul,* 382 U.S. 198. That is not a self-executing task. Here, no less than in other areas where governmentally imposed racial discrimination was deep-rooted and pervasive, a mere abandonment of the old practices will not restore the balance. Cf. *Louisiana* v. *United States,* 380 U.S. 145, 154; *South Carolina* v. *Katzenbach,* 383 U.S. 301, 327–337. Neutrality is not

enough; affirmative measures must be taken to overcome the effects of past discrimination and reverse the direction.

An essential goal of the conversion process is to terminate the racial identification of particular schools as "Negro" schools or "white" schools. That aspect of the problem is highlighted in two of the cases before the Court (Nos. 695 and 805), involving systems with only two plants, one traditionally allocated to Negroes, the other to whites. Of course, the facilities must be equalized and deliberate steps must be taken to desegregate their faculties and staff. In some communities that may be enough to establish a new climate in which voluntary student desegregation will follow under a "freedom-of-choice" plan. And in other areas where residential patterns and the present location of schools would perpetuate segregation under a geographic assignment plan, a "freedom-of-choice" technique may offer more promise as an interim measure until new schools are constructed. But, as Judge Sobeloff observed below, concurring specially in the New Kent, Virginia case (No. 695, A. 79):

> "Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. * * *.

In the circumstances of these cases, it is plain that "freedom-of-choice" is not a tool to achieve desegregation. On the contrary, in New Kent, Virginia, and

Gould, Arkansas, where geographic zoning would integrate the two schools of the district, it is apparent that "freedom-of-choice" works in the opposite direction, to perpetuate an identifiably "Negro" school, attended only by Negroes. And, although less dramatically, the "free transfer" policy followed in Jackson, Tennessee, likewise tends to defeat the substantial degree of pupil desegregation that would result from strict geographic zoning.

In our view, these facts alone condemn the plans in suit as inadequate measures to disestablish the dual school system. Cf. *Goss* v. *Board of Education,* 373 U.S. 683. But there are other reasons to question the constitutional validity of the "freedom-of-choice" technique as it operates here. These are broader grounds, which we think relevant, though the Court may find it unnecessary to reach them.

II

The actual results in these cases demonstrate that, in some circumstances at least, "freedom-of-choice" plans empower the white students effectively to segregate the school system by assigning themselves away from the schools they would otherwise be attending with Negroes. And there is no doubt that the consequence of racial isolation for the Negro children puts them at a disadvantage. Not only are they deprived of contacts and experiences which would enable them to participate on a more equal footing in the public and private life of the dominant community (see *Sweatt* v. *Painter,* 339 U.S. 629, 634–635; *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637, 640–642; and see U.S. Commission on Civil Rights, I *Racial Isolation in*

the Public Schools (1967), pp. 100–114, 193, 203–204), but, shunned by the whites, the Negro children are unmistakably told that their separation is not the accidental result of neutral geographical zoning, but, rather, the deliberate consequence of a system which, as *Brown* emphasized (347 U.S. at 494), "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The question accordingly arises whether segregation, so caused, offends the Constitution.

The courts below thought the result constitutionally unobjectionable, apparently reasoning that the injury was self-inflicted in view of the seemingly equal opportunity given the Negro students to determine their own assignments and thus to avoid their separation by pursuing the white students. In our view, that is not an adequate answer.

1. Initially, we have difficulty with the premise that the Negro students in areas like those involved here enjoy a truly unencumbered option to move away from their traditional schools. The Fourth Circuit itself, in one of the cases under review (No. 695, A. 67), has emphasized that "'freedom of choice' is acceptable only if the choice is free in the practical context of its exercise." And the court went on to add that "[i]f there are extraneous pressures which deprive the choice of its freedom, the school board may be required to adopt affirmative measures to counter them" (*id.*). But is this a realistic approach?

We do not believe that it is enough to eliminate only the grosser forms of intimidation—threats of

physical injury or economic reprisal—even assuming that judicial decrees or administrative action can effectively deal with such pressures. The reality is that a variety of more subtle influences—short of outright intimidation—tend to confine the Negro to his traditional school. Insecurity, fear, founded or unfounded, habit, ignorance, and apathy, all inhibit the Negro child and his parents from the adventurous pursuit of a desegregated education in an unfamiliar school, where he expects to be treated as an unwelcome intruder. And corresponding pressures operate on the white students and their parents to avoid the "Negro" school.[2] No doubt, special provisions in the

[2] Some of the factors at work are isolated in the report of the U.S. Commission on Civil Rights, *Survey of School Desegregation in the Southern and Border States—1965–1966* (1966), pp. 51–52, quoted by Judge Sobeloff, concurring below in the New Kent, Virginia case (No. 695, A. 80–81):

> Freedom of choice plans accepted by the Office of Education have not disestablished the dual and racially segregated school systems involved, for the following reasons: a. Negro and white schools have tended to retain their racial identity; b. White students rarely elect to attend Negro schools; c. Some Negro students are reluctant to sever normal school ties, made stronger by the racial identification of their schools; d. Many Negro children and parents in Southern States, having lived for decades in positions of subservience, are reluctant to assert their rights; e. Negro children and parents in Southern States frequently will not choose a formerly all-white school because they fear retaliation and hostility from the white community; f. In some school districts in the South, school officials have failed to prevent or punish harassment by white children who have elected to attend white schools; g. In some areas in the South where Negroes have elected to attend formerly all-white schools, the Negro community has been subjected to retaliatory violence, evictions, loss of jobs, and other forms of intimidation.

"freedom-of-choice" plan can mitigate the play of these forces. But when the results are like those in these cases, we think it blinks reality to assume that the persistence of all-Negro schools is the consequence of wholly voluntary self-segregation by the Negro students.

2. Even if one could properly characterize the result as the product of truly free choice, however, it would be constitutionally objectionable because the exercise of the option involves an improper burden where the racial identity of the schools has not been eliminated. Thus, the Fourth and Fifth Circuits have disapproved transfer plans which require the Negro students to take special steps to obtain a desegregated education. In the words of the Fourth Circuit, in one of the cases under review (No. 695, A. 66):

> The burden of extracting individual pupils from discriminatory, racial assignments may not be cast upon the pupils or their parents. It is the duty of the school boards to eliminate the discrimination which inheres in such a system.

See, also, *United States* v. *Jefferson County Board of Education, supra,* 372 F. 2d at 864–867. In our view, the same rationale condemns the present plans, which unnecessarily shift the burden to the Negro to seek his way out of his traditional school.

Under a plan like that prevailing in Jackson, Tennessee, where initial assignments are made by geograpical zones, special steps must be taken to transfer elsewhere. That is, in itself, an obstacle. The burden on the Negro is not lightened because the white students must also assume it if they wish to avoid the

traditionally Negro school to which proximity first assigns them. Cf. *Griffin* v. *School Board,* 377 U.S. 218. Nor are the obstacles in fact equal in the situation that most concerns us, the persistence of the all-Negro school. Where students of both races have been initially assigned, on the basis of residence, to a traditionally Negro school, the decision to transfer elsewhere is obviously more difficult for the Negro. Unlike the white child whose "transfer" merely returns him to his accustomed school, the Negro is required to sacrifice old ties for an uncertain welcome if he wishes to pursue his search for a desegregated education.

Nor are these problems immediately overcome by the "freedom-of-choice" provisions prevailing in New Kent, Virginia, and Gould, Arkansas. Something is gained by requiring everyone to express a choice before any assignment is made. But that does not eliminate all the pressures weighing on the Negro—and to a lesser extent on the white—to "choose" in favor of the *status quo.* Again, an uneven burden falls on the Negro if he is to leave his traditional school. At least where all the white students have shunned the local Negro school, the decision to follow them requires courage, and, for the pioneers at least, a willingness to subordinate personal advantage to the common good of the race. See *Kelley* v. *Altheimer, Ark. Public School Dist. No. 22,* 378 F. 2d 483, 486–487, n. 6 (C.A. 8).

We do not mean to exaggerate the tendency of "freedom-of-choice" plans to perpetuate the all-Negro school or the special burden they impose on

Negroes to remove themselves from their old segregated institutions. Of course, individuals can resist the pressures and in some communities the technique may work. Yet, where, as in these cases, freedom-of-choice does not eliminate the all-Negro school, it would be pure irony if Negro children or their parents, already victims of educational segregation, suffering the very handicaps that this Court sought to avoid for the future, were held to have "waived" the promise of *Brown*. Cf. *Lane* v. *Wilson*, 307 U.S. 268, 276. However surmountable they may be, the Constitution does not tolerate the erection of unnecessary hurdles to the enjoyment of fundamental rights. See, *e.g.*, *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337. Cf. *Lamont* v. *Postmaster General*, 381 U.S. 301; *Harman* v. *Forssenius*, 380 U.S. 528; *Shelton* v. *Tucker*, 364 U.S. 479, 488; *Speiser* v. *Randall*, 357 U.S. 513; *Thomas* v. *Collins*, 323 U.S. 516.

3. The situation would be different if the burden, and the resulting injury, were unavoidable, or even if pupil assignment were traditionally a matter left to the free play of private choice. But that is not the fact. On the contrary, compulsory assignment of public school students had been the almost invariable rule, North and South, until *Brown*. Freedom-of-choice plans—haphazard and administratively cumbersome[3]—have been devised for the apparent purpose of allowing the white students to accomplish what the

[3] See *Singleton* v. *Jackson Municipal Separate School District*, 355 F. 2d 865, 871 (C.A. 5).

State could no longer provide for them.[4] Essentially, the assignment of students is a governmental function, controlled by the requirements of the Fourteenth Amendment. Cf. *Marsh* v. *Alabama,* 326 U.S. 501; *Terry* v. *Adams,* 345 U.S. 461; *Evans* v. *Newton,* 382 U.S. 296. And, as this Court observed in *Burton* v. *Wilmington Pkg. Auth.,* 365 U.S. 715, 725, "no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be."

The suggestion that the action of the students in effectively segregating themselves need be of no concern to the State may be compared to the proposition that the State, which has a constitutional duty to avoid discrimination in jury selection, is free to allow prospective jurors to separate themselves on racial lines for service on particular panels. The unconstitutionality of such a permissive arrangement is surely beyond debate. The reason is not that a defendant has a right to be tried by a racially representative jury (see *Cassell* v. *Texas,* 339 U.S. 282), but, rather, that the State may not permit discrimination to influence the selection of a jury. The same principle governs here: even if accidental segregation in public education is permissible, the Constitution does not tolerate

[4] The lower courts have recognized that in some communities freedom-of-choice was adopted because alternative plans would require white pupils to attend Negro schools. See *Lee* v. *Macon County Board of Education,* 267 F. Supp. 458, 479, n. 27 (M.D. Ala.), affirmed *sub nom. Wallace* v. *United States,* 389 U.S. 215; *United States* v. *Jefferson County Board of Education, supra,* 372 F. 2d at 878, 888–889. And see the testimony of the Superintendent of the Gould, Arkansas, schools (No. 805, A. 67).

schemes which invite that result to be accomplished by indirect means through a delegation of State responsibility. Cf. *St. Helena Parish School Board* v. *Hall,* 368 U.S. 515; *Goss* v. *Board of Education, supra; Griffin* v. *School Board, supra; Louisiana Financial Assistance Comm.* v. *Poindexter,* No. 793, this Term, decided January 15, 1968, affirming 275 F. Supp. 833 (E.D. La.).

In sum, where freedom-of-choice plans leave the schools essentially segregated, while a more traditional assignment policy would not, that segregation may fairly be attributed to the State. That conclusion alone covers the present cases. But the fact that the State is knowingly contributing to the result has another dimension also.

4. By resorting to a permissive device which, in context, seems to serve no purpose other than to defeat or retard integration, the State is declaring its approval of the discrimination which it allows to govern pupil assignments. The effect is two-fold: the apparent official sanction given to the preference of the white students aggravates the injury to the Negro children; and, at the same time, it lends encouragement to the separation of the white students and tends to stiffen those very attitudes that desegregation might relax.

There is, of course, nothing novel in the proposition that the Equal Protection Clause forbids official action which injures the Negro by implying his unfitness or inferiority as a class and encourages private racial prejudice. Indeed, this is the rationale of *Strauder* v. *West Virginia,* 100 U.S. 303, one of the

Clearly the respondents are not "duty bound" under the Fourteenth Amendment to compel Negro and white students alike, solely because of their race, to attend certain schools for the avowed purpose of integrating the races, their free choices to the contrary notwithstanding.

Later decisions of this Court likewise fail to support the petitioners' argument that the States have an obligation under the Fourteenth Amendment to enforce a mixed racial composition in their public school systems. In fact, this Court has conveyed the clear impression that a freedom of choice plan is constitutionally permissible under the *Brown* mandate, even though some sort of racial balance between Negroes and whites is not thereby produced throughout the school system. Thus, *Calhoun* v. *Latimer*, 377 U.S. 263 (1964), was remanded to the district court for an evidentiary hearing to determine whether the respondent's free transfer plan, with the addenda adopted subsequent to argument, satisfied the desegregation mandate of *Brown*.

Goss v. *Board of Education of Knoxville*, 373 U.S. 683, 689 (1963), focused on the elimination of "state-imposed racial conditions" in the transfer of pupils. There the plan re-zoned school districts without reference to race but set up a transfer system under which students, upon request, would be permitted—solely on the basis of their race and the racial composition of the school to which they had been assigned—to transfer from such school, where they would be in the racial minority, back to their former segregated school, where their race would be in the majority.

Although this Court held that a racial criterion for purposes of transfer between public schools was unconstitutional, it noted that:[14]

[14] 373 U.S. at 687.

> [I]f the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the schools to which he requested transfer we would have an entirely different case. *Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations,* to remain in the school of their zone or to transfer to another. (Emphasis added.)

The respondents' free choice plan is that "entirely different case" in which each pupil (or his parents) is free to choose which school he will attend, "entirely free of any imposed racial considerations." There the pupil (or his parents) had to show that he came under the majority-minority transfer rule to justify his choice. Here the pupils are not required to justify their choice by any racial criterion. It is unrestricted and unencumbered and, therefore, consistent with the following dictum from *Goss* v. *Board of Education of Knoxville, supra,* at 688-89:

> This is not to say that appropriate transfer provisions, upon the parents' request, consistent with sound school administration and not based upon any state-imposed racial conditions would fall. Likewise, *we would have a different case here if the transfer provisions were unrestricted,* allowing transfers to or from any school regardless of the race of the majority therein. (Emphasis added.)

There is no difference in principle in the respondents' plan, which gives to each pupil an unrestricted right each year to choose the school he wishes to attend, and a plan which assigns pupils on a non-racial basis and then gives them an unrestricted right each year to transfer to the school they wish to attend.

Although this Court has decided several other cases involving desegregation, the issue in most of them has been speed, *i.e.*, the number of grades to be desegregated within a given time. Speed is not an issue in this case. The respondents' desegregation plan applied to all grades in the schools effective the 1966-67 school year.

2. *In the other Federal Courts*

The gist of the petitioners' argument is that a public school system is segregated as long as there remains any school which is not attended by both white and Negro children. This argument was rejected by the three judge court on the remand in *Brown* v. *Board of Education of Topeka,* 139 F. Supp. 468, 470 (D. Kan. 1955):

> It was stressed at the hearing that such schools as Buchanan are all-colored schools and that in them there is no intermingling of colored and white children. Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.

In *Briggs* v. *Elliott,* 132 F. Supp. 776, 777 (E.D.S.C. 1955), Judge Parker made perhaps the most famous expression of the constitutional distinction embodied in the *Brown* mandate:

> What [the Supreme Court] has decided . . . is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in

other words, does not require integration. It merely forbids discrimination.

This fundamental distinction is supported by decisions in the Circuit Courts of Appeal for the Fourth Circuit (*Bradley* v. *School Board of City of Richmond, supra,* which was followed by the Court of Appeals in the case at bar), the Sixth Circuit (*Monroe* v. *Board of Commissioners of City of Jackson,* 380 F. 2d 955 (1967)) (now under review in No. 740), the First Circuit (*Springfield School Committee* v. *Barksdale,* 348 F. 2d 261 (1965)), the Seventh Circuit (*Bell* v. *School City of Gary,* 324 F. 2d 209 (1963), *cert. den.,* 377 U.S. 924), the Eighth Circuit (*Clark* v. *Board of Education of Little Rock School District,* 369 F. 2d 661 (1966), *reh. den.,* 374 F. 2d 569)[15] and the Tenth Circuit (*Downs* v. *Board of Education of Kansas City,* 336 F. 2d 988 (1964), *cert. den.,* 380 U.S. 914).

The same distinction is implicit in *Evans* v. *Ennis,* 281 F. 2d 385 (3d Cir. 1960). Although Judge Biggs' statement quoted on page 37 of the petitioners' Brief appears to support their position ("The Supreme Court has unqualifiedly declared integration to be their constitutional right."), it has been lifted out of the context of his repeated statements about Negro children who "desire," "seek" and "will seek" integration. There was no suggestion that the state was to compel integration where the children (or parents) did not desire or seek to attend school on an integrated basis. See also *Taylor* v. *Board of Education of City*

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[15] *Contra, Kemp* v. *Beasley,* ..... F. 2d. ....., No. 19017 January 9, 1968 (different panel of 8th Circuit). Compare *Raney* v. *Board of Education of Gould School District,* 381 F. 2d 252 (8th Cir. 1967) (now under review in No. 805), with *Kelley* v. *Altheimer, Arkansas Public School District, supra,* for a further illustration of the division in opinion among the panels in the Eighth Circuit.

School District of New Rochelle, 294 F. 2d 36 (2d Cir. 1961), *cert. den.*, 368 U.S. 940, where the court, after finding that the school board had deliberately drawn and maintained district lines to perpetuate a "Negro" school, decreed that the pupils were to be permitted (not compelled) to transfer to other schools.

Moreover, support for the petitioners' position is more apparent than real in *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 375 F. 2d 158 (10th Cir. 1967), *cert. den.*, 387 U.S. 931. That case must be read in the light of *Downs* v. *Board of Education of Kansas City*, *supra*, where the use of geographic attendance zones had resulted in some schools having an all white and some schools having an all Negro enrollment. The appellants' argument that this result rendered the zone plan unconstitutional was rejected by the court, at 998:

> Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of Brown v. Board of Education, supra, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there seems to be authority to support that contention, *the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school with them.* (Footnote omitted.) (Citations omitted.) (Emphasis added.)

This principle was reaffirmed in the Oklahoma City case even though it required the school board to take affirmative action to promote integration. The distinction between the two cases is that in Oklahoma City the school

board had acted in bad faith in its plans (or lack thereof) to desegregate the school system (even failing to comply with a court order), while in the Kansas City case the school board had acted in good faith.

The Fifth Circuit alone has stated without qualification that there is no distinction in constitutional principle between "desegregation" and "integration," and that the states have a duty under the *Brown* mandate to take affirmative action to achieve a mixed racial composition in all schools in the system.[16] This position runs counter to the cases cited above from the other circuits, to the proscriptive language of the Fourteenth Amendment, to the Civil Rights Act of 1964 and to the views of those who are trying to keep the educational lighthouse in sight amidst the turbulent seas of litigation.

"Segregation" is, according to the petitioners' definition, both a condition and an activity. In their use it means any situation in which all pupils in a particular school are of the same race, and apparently they contend that even so defined it is unconstitutional—at least in the South. The sounder view, it is submitted, is that merely the existence of a wholly white or wholly Negro school is not unconstitutional *per se*.[17] The missing ingredient is someone who is discriminated against, who is denied admission solely because of race. This is the true focus of the *Brown* mandate, and it points up the distinctive meaning of the words involved. The mandate was thus understood by Jack Greenberg, principal counsel for the petitioners:[18]

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[16]*United States* v. *Jefferson County Board of Education*, 372 F. 2d 836 (5th Cir. 1966), *aff'd with modifications on rehearing en banc*, 380 F. 2d 385 (1967) (four judges dissenting), *cert. den. sub. nom.*, *Caddo Parish School Board* v. *United States*, 389 U.S. 840.

[17]See Conant, Note 11, *supra*.

[18]Greenberg, *Race Relations and American Law* pp. 239-40 (1959). See Conant, Note 11, *supra*.

> Moreover, the jury discrimination precedents may be recalled: Bias may be presumed from a consistently segregated result; a token number of Negroes may be legally equivalent to none. If, however, in education there were complete freedom of choice, or geographic zoning, or any other nonracial standard, and all Negroes still ended up in certain schools, there would seem to be no constitutional objection.

"Segregation," "desegregation" and "integration" are, therefore, words of art in legal contemplation, though it is significant that they are assigned distinctive meanings in other disciplines as well. Thus, Milton Myron Gordon, a sociologist at the University of Massachusetts, has written:[19]

> Desegregation refers to the elimination of racial criteria in the operation of public or quasi-public facilities, services, and institutions, which the individual is entitled to as a functioning citizen of the local or national community, equal in legal status to all other citizens. . . . Integration, however, embraces the idea of the removal of prejudice as well as civic discrimination and therefore refers to much more.

Proper definitions of these terms can be framed on the basis of the great body of decisional law and the Civil Rights Act of 1964[20]:

> Segregation—a system whereby persons of different races are required by the state to attend public schools set apart for their use only and are denied admission to all other public schools by the state solely because of a racial criterion.

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[19]Note 7, *supra*, p. 246. See generally Handlin, *The Goals of Integration*, from *Daedalus*, p. 268 (Winter 1966).

[20]78 Stat. 241.

> Desegregation—a plan whereby persons of different races are admitted to the public schools in the system without regard to their race.
>
> Integration—the intermingling of persons of different races in the same public schools, either by the free choice of the persons themselves or by compulsory assignment by the state through the use of race as a criterion for assignment.

3. *In the Congress*

The legislative history of the Civil Rights Act of 1964 clearly shows that Congress did not intend or announce a national policy requiring the states to take affirmative action to achieve integration of the races in every school throughout the public school system. This is manifest from the statements of the Senate floor leader for the Act, Hubert H. Humphrey, whose language paraphrased Judge Parker in *Briggs* v. *Elliott, supra*:[21]

> Judge Beamer's opinion in the Gary case [*Bell* v. *School City of Gary,* 213 F. Supp. 819 (N.D. Ind. 1963)] is significant in this connection. In discussing this case, as we did many times, it was decided to write the thrust of the court's opinion into the proposed substitute.
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> . . .
>
> I should like to make one further reference to the Gary case. This case makes it quite clear that while the Constitution prohibits segregation, it does not require integration. . . . *The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school systems.* (Emphasis added.)

Since Congress intended to write the "thrust" of the *Gary* opinion into the Civil Rights Act, an examination of that

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[21] 110 Cong. Rec. 12715, 12717.

case will disclose the national policy embodied in the Act. The third question presented to the court for determination in that case is the same that the petitioners now present to this Court:

> Whether the plaintiffs [approximately 100 minor Negro children] and other members of the class have a constitutional right to attend racially integrated schools and the defendant has a constitutional duty to provide and maintain a racially integrated school system. *Id.* at 820.

The question was answered in the negative by Judge Beamer, who relied upon *Brown* v. *Board of Education of Topeka, supra,* and *Evans* v. *Buchanan,* 207 F. Supp. 820 (D. Del. 1962). Judge Beamer quoted with approval from the latter case, at 830:

> '[T]he States do not have an affirmative, constitutional duty to provide an integrated education. The pertinent portion of the Fourteenth Amendment . . . reads, "nor [shall any State] deny any person within its jurisdiction the equal protection of the laws." This clause does not contemplate compelling action; rather, it is a prohibition preventing the States from applying their laws unequally.'

Therefore, the Civil Rights Act of 1964 embodies the policy that, while no Negro shall be denied admission to any public school solely because of his race, there is no constitutional right to attend a racially integrated school and no corresponding duty on the state to achieve racial integration in all schools. Any lingering doubts should have been set to rest by the reaffirmation of this policy in the 1966 amendments to the Elementary and Secondary

Education Act of 1965, which added the emphasized language below:[22]

> In the administration of this chapter, no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the personnel, curriculum, or program of instruction of any school or school system of any local or State educational agency, *or require the assignment or transportation of students or teachers in order to overcome racial imbalance.*

C. Fulfilling the *Brown* v. *Board of Education* Mandate: The Freedom of Choice Plan

1. *Whether the plan "works"—constitutional principle or mathematical equation?*

Freedom of choice plans have met with approval despite the objections now made by the petitioners. The argument that they do not "work" because too few Negroes choose to attend formerly all white schools and whites seldom choose to attend the school formerly for Negroes alone was made and answered in *Clark* v. *Board of Education of Little Rock School District, supra,* at 666:

> Plaintiffs are disturbed because only 621 of 7,341 Negroes in the Little Rock school system of 23,000 . . . were actually attending previously all white schools.[23] Thus, they argue that the 'freedom of choice' plan is not succeeding in the integration of the schools. Though the Board has a positive duty to initiate a

[22] 80 Stat. 1212.

[23] HEW Documents filed by the petitioners show that 115 of 736 Negroes are attending the formerly all white school in New Kent County, Virginia, in 1967-68.

plan of desegregation, the constitutionality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races. The Constitution prohibits segregation of the races, the operation of a school system with dual attendance zones based upon race, and assignment of students on the basis of race to particular schools. If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas, or considering race in the assignment of students to their classrooms. . . . The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools.[24]

A like objection to freedom of choice was rejected in *Bradley* v. *School Board of City of Richmond, supra,* at 315-16:

[T]he plaintiffs insist that there are a sufficient number of Negro parents who wish their children to attend schools populated entirely, or predominantly, by Negroes to result in the continuance of some schools attended only by Negroes. To that extent, they say that, under any freedom of choice system, the state 'permits' segregation if it does not deprive Negro parents of a right of choice.

It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination. Everyone of every race has a right to be free of discrimination by the state by reason of his race. There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's

[24] *Contra, Kemp* v. *Beasley, supra* (different panel).

> right to be free from discrimination requires that the state deprive him of his volition is incongruous.
>
> . . .
>
> There is no hint [in *Brown*] of a suggestion of a constitutional requirement that a state must forbid voluntary associations or limit an individual's freedom of choice except to the extent that such individual's freedom of choice may be affected by the equal right of others. A state or a school district offends no constitutional requirement when it grants to all students uniformly an unrestricted freedom of choice as to schools attended, so that each pupil, in effect, assigns himself to the school he wishes to attend.[25]

2. *Private discrimination—promoted or suffered?*

The petitioners have varied the theme of the arguments in *Clark* and *Bradley* in an effort to bring freedom of choice within the pale, however peripheral, of proscribed "state action" under the Fourteenth Amendment. Thus, in note 53 on page 42 of their Brief they suggest that by permitting students (or parents) to choose their schools, the respondents promote invidious discrimination which renders the plan unconstitutional.[26]

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[25]Under the respondents' freedom of choice plan there is a 15 day choice period each year, all school activities are covered, transportation is without regard to race, no person may be penalized or favored because of the choice made, and no school personnel may advise, recommend or influence choices. See *Goss* v. *Board of Education of Knoxville, supra.*

[26]The same point is stressed by the Solicitor General in his amicus Memorandum. He seems to assume that a freedom of choice plan peculiarly enables school patrons to succumb to the blandishments of racial prejudice. In reality school patrons are as likely to succumb even where geographic zoning or pairing devices are employed. The experience in the North and Washington, D. C., bears this out. The fact of the matter is that, in terms of integration, Negroes have a greater option under the freedom of choice plan. This is true because

The flaw in this argument is that, while the petitioners concede that the Constitution does not prohibit private discrimination, they are unable to point to any *affirmative race-related activity* on the part of the respondents. It is settled, of course, that the state may remain neutral with respect to private racial discrimination. See *Reitman* v. *Mulkey,* 387 U.S. 369 (1967). And this would seem to be a sufficient answer to the petitioners' argument because here, unlike *Reitman* v. *Mulkey, supra,* and other so-called "state action" cases,[27] the state has made no classification on the basis of race and has not acted in any way to inject racial considerations in the free choice process.

The validity of the respondents' plan is not based upon their neutrality, however. It is based upon the fact that the respondents have taken affirmative action towards the elimination of race as a criterion in the school community under the free choice plan. Thus, the Choice of School Form sent annually is accompanied by a letter on the school board letterhead, signed by the Superintendent of Schools, stating the following:

> Dear Parent:
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> A plan for the desegregation of our school system has been put into effect so that our schools will operate

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people may choose where they will live and whether their children will attend a private school, but because of their economic condition and housing pattern Negroes do not enjoy the same choice. A freedom of choice plan alone enables Negroes to break away from housing patterns and a disadvantaged economic condition to achieve education in an integrated school. See *Clark* v. *Board of Education of Little Rock School District, supra.* Taliaferro County, Georgia, is a case in point. Its two schools were paired in 1965, when there were some 600 Negro students and 200 white students. In 1967 there were 527 Negro students and no whites. *United States* v. *Jefferson County Board of Education, supra,* at 416, n. 6.

[27] *E.g., Robinson* v. *Florida,* 378 U.S. 153 (1964), *Anderson* v. *Martin,* 375 U.S. 399 (1964), and *Lombard* v. *Louisiana,* 373 U.S. 267 (1963).

> in all respects without regard to race, color, or national origin.
>
> . . .
>
> [T]here will be no discrimination based on race, color, or national origin in any school-connected services, facilities, activities and programs.[28]

The respondents have, therefore, committed the influence of their office to a nonracial school system and have commended such a system to the community by means of this letter and by the publicity and community preparation activities spelled out in Article X of the Plan for School Desegregation.[29]

3. *Free choice—whose?*

The exercise of the choice in an acceptable freedom of choice plan was discussed by Judge Haynsworth in the companion case, *Bowman* v. *County School Board of Charles City County, supra,* at 327-28:

> If each pupil, each year, attends the school of his choice, the Constitution does not require that he be deprived of his choice unless its exercise is not free.
>
> . . .
>
> Whether or not the choice is free may depend upon circumstances extraneous to the formal plan of the school board. If there is a contention that economic or other pressures in the community inhibit the free exercise of the choice, there must be a judicial appraisal of it, for 'freedom of choice' is acceptable only if the choice is free in the practical context of its exercise. If there are extraneous pressures which deprive the choice of its freedom, the school board may be re-

[28]The letter is set out in the petitioners' Appendix at pp. 43a-44a.
[29]The Plan is set out in the Petitioners' Appendix at pp. 34a-40a.

quired to adopt affirmative measures to counter them.

. . .

> Since *the plaintiffs here concede that their annual choice is unrestricted and unencumbered,* we find in its existence no denial of any constitutional right not to be subjected to racial discrimination. (Emphasis added.)

Despite their concession in the Court of Appeals, the petitioners apparently take the position that a free choice for Negroes in the South is a contradiction in terms. Yet they were unable to offer for judicial appraisal by the District Court anything other than speculation and conjecture. Therefore, cases such as *Coppedge* v. *Franklin County Board of Education,* 273 F. Supp. 289 (E.D.N.C. 1967), are scarcely relevant.

Moreover, the petitioners' argument that Negroes in New Kent County do not have a free choice is, in logic, *post hac ergo propter hac.* From the fact that a greater number of Negro students have not chosen to attend the formerly all white school, the petitioners conclude that the Negroes do not have a free choice. What the petitioners overlook is that Negroes, like whites, may choose to remain in the same school simply because the surroundings are familiar and they have friends there.

Because they view any choice as the product of racial prejudice (whites) or coercion (Negroes) and disclaim non-racial choices, the petitioners would deny a choice to everyone—students and parents alike. The fundamental right of parents to direct the education of their children is, therefore, to be denied in the name of integration, their preference to the contrary notwithstanding.[30]

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[30] *Cf. Pierce* v. *Society of Sisters of Holy Names,* 268 U.S. 510 (1925), and *Meyer* v. *Nebraska,* 262 U.S. 396 (1923).

4. *Compulsory integration in formerly de jure systems—principle or purge?*

The petitioners argue that, since there was de jure segregation in the New Kent County schools at the time of *Brown* v. *Board of Education, supra,* the respondents have an affirmative duty under the Fourteenth Amendment to enforce integration of the races in every public school. In support of this unique argument, they quote at length from *United States* v. *Jefferson County Board of Education, supra,* which, interestingly enough, concluded by approving a freedom of choice plan.

There the court found such a duty following its reexamination of school desegregation standards in the light of the Civil Rights Act of 1964 and the HEW Guidelines. As we have seen, the congressional intent was to embody in the Act the decision of Judge Beamer in *Bell* v. *School City of Gary, supra.* In *Jefferson County* the court (divided 2-1) excised this intent by a tailored construction of the legislative history. It found that, although Senator Humphrey spoke several times in the language of *Briggs* v. *Elliott,* his references to *Bell* v. *School City of Gary* "indicated" that the policy against affirmative, compulsory action to achieve racial balance was directed to the Gary, Indiana, de facto segregation and did not apply to de jure segregation. Therefore, the court concluded, there was in fact a national policy that formerly de jure segregated public school systems were obligated to take affirmative action in order to achieve a mixed racial composition throughout the entire system.[31]

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[31]The HEW Guidelines were considered an expression of such a national policy. In the instant case the petitioners did not, and properly so, predicate their case on the HEW Guidelines. Indeed, in note 44 on page 32 of their Brief the petitioners make an interesting

This conclusion is untenable, as four judges vigorously pointed out on the rehearing *en banc*. In the first place, the decision ignores the fact that the Gary school system had de jure segregation until 1949, and that Judge Beamer cited cases which upheld *Briggs* v. *Elliott*, clearly a de jure segregation situation. Secondly, the decision fashions a double standard under the Fourteenth Amendment, one for the South and another for the North, on the basis of the de jure-de facto distinction. This is without support in principle and reason. It completely rejects the fact that prior to 1954 racially separate, if equal, public schools had not been declared unconstitutional.

The real concern about *Jefferson County* is that it will not be understood for what it is—an exercise in "social engineering."[32] There is cause for optimism, however, because the decision was not accepted by the Fourth Circuit in this case, and the error in its de jure-de facto distinction was clearly seen in *Monroe* v. *Board of Commissioners of City of Jackson*, *supra*, at 958:

> However ugly and evil the biracial school systems appear in contemporary thinking, they were, as *Jefferson*, supra, concedes, de jure and were once found lawful in Plessy v. Ferguson . . . and such was the law for 58 years thereafter. To apply a disparate rule because these early systems are now forbidden by *Brown* would

concession regarding the Guidelines. They state that HEW has approved free choice plans, despite their inability to disestablish the dual system, only because such plans have received approval in the courts. "It feels, perhaps properly, that *it may not enforce requirements more stringent than those imposed by the Fourteenth Amendment.*" (Emphasis added.) This is tantamount to a concession by the petitioners that the requirements they now ask this Court to impose *are* more stringent than those imposed by the Fourteenth Amendment.

[32]See Notes 8 and 9, *supra*. *Cf. Moses* v. *Washington Parish School Board*, 276 F. Supp. 834 (E. D. La. 1967).

> be in the nature of imposing a judicial Bill of Attainder. . . . Neither, in our view, would such decrees comport with our current views of equal treatment before the law.

5. *Integration and education—antitheticals?*

It is hoped that the educational lighthouse is still in sight. It calls for an equal educational opportunity for all children, regardless of race, color or national origin. The respondents maintain that their public school system offers an opportunity for each child to receive as good an education as every other child in the system, and apparently the petitioners do not challenge this in fact.

Their position seems to be that, as a matter of principle, the educational opportunity of Negro children is unequal and can never be equal unless they are made to attend classes with white children. Thus, if the free choices of children and parents produce schools which do not grant to Negro children the "advantage" of education with white children, the Negro children are, *ipso facto*, receiving an education inferior to that of the whites and their fellow Negroes who are attending school with whites.

That argument is manifestly erroneous in two respects. First, it assumes that Negro children who freely choose not to attend an integrated school are thereby harmed. It is too incredible for belief that this circumstance generates a feeling of inferiority as to their status in the community. Certainly this proposition has never been tested and proved. *Moses* v. *Washington Parish School Board, supra.* The second, and more fundamental error, was discussed in *Moses* at 845, 846:

> It should be noted that the rather obvious objective of the proponents of the 'equal educational opportunity' theory is the elimination of racial prejudice

> through the public school system, rather than the immediate fulfillment of equal educational opportunities for all students. Little has been put forth to prove that actual and active integration will in fact of itself raise the educational opportunities even of formerly segregated Negro students.
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> . . .
>
> [T]he emphasis should always be on a good education for all students, and courts should refuse to rule that a particular all-Negro school, where the Negro concentration is fortuitous, is *ipso facto* unequal and that the solution to the 'problem' is the forced mixing of the races.

Long ago it was settled that the hearts and minds of Negro children are adversely affected by a state's refusal to admit them, solely because of their race, to the schools of their choice. We have now come full circle, but little or no consideration seems to have been given to the effect of compulsory integration on Negroes and whites alike. Is there no danger in compelling children, in the name of integration, to attend a certain school in order to achieve a certain racial composition, regardless of their own desires? The matter was aptly put in *Olson* v. *Board of Education of Union Free School District,* 250 F. Supp. 1000, 1006 (E.D.N.Y. 1966), *appeal dismissed,* 367 F. 2d 565 (2d Cir.):

> [N]or did it [*Brown*] decide that there must be coerced integration of the races in order to accomplish educational equality for this also would require an appraisal of the effect upon the hearts and minds of those who were so coerced.

Like caveats have been sounded in terms of how compulsory integration will affect the educational imperative. James Bryant Conant, whom the petitioners identify on

page 44 of their Brief as the author of the most important study of secondary education in America, warrants quoting at length:[33]

> In some cities, political leaders have attempted to put pressure on the school authorities to have Negro children attend essentially white schools. In my judgment the cities in which the authorities have yielded to this pressure are on the wrong track. Those which have not done so, like Chicago, are more likely to make progress in improving Negro education. It is my belief that satisfactory education can be provided in an all-Negro school through the expenditure of more money for needed staff and facilities. Moreover, I believe that any sense of inferiority among the pupils caused by the absence of white children can be largely if not wholly eliminated in two ways: first, in all cities there will be at least some schools that are in fact mixed because of the nature of the neighborhood they serve; second, throughout the city there ought to be an integrated staff of white and Negro teachers and administrators.[34]

A similar position has been taken by Oscar Handlin, another distinguished writer, who has called integration a "false issue":[35]

> The insistence upon integration is thus self-frustrating, as the experience of Washington, D. C., shows. Further pressure toward racial balance will certainly weak-

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[33]Note 11, *supra*, pp. 28-29.

[34]The second suggestion of Dr. Conant points up the wisdom of the Circuit Court in remanding this case to the District Court to review and update the record and fashion proper decrees based upon its continuing observation of the plan in operation through the retention of jurisdiction.

[35]Note 19, *supra*, p. 282.

en the public schools and leave the Negroes the greatest sufferers.[36]

These views warrant serious consideration. They make a point which has been overlooked too often: Desegregation (*i.e.*, the elimination of state enforced segregation solely because of race) is a legal question; integration (*i.e.*, the compulsory assignment of pupils to achieve intermingling) is an education question—best left for decision by educators, for educational purposes, on the basis of educational criteria.[37] A freedom of choice plan alone honors this distinction.

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[36] *Id.* at 281. The experience in Taliaferro County, Georgia (Note 26, *supra*) is a sad illustration of this. A unitary system was achieved, of course, but it is hardly what the proponents of compulsory integration intended and is unlikely to afford an adequate—let alone equal—educational opportunity to the Negro students.

[37] See Notes 8 and 9, *supra*.

CONCLUSION

WHEREFORE, for the foregoing reasons it is respectfully submitted that the judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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